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BYE, BYE, BILINGUALS: THE REMOVAL OF ENGLISH-SPANISH BILINGUALS FROM THE CRIMINAL JURY AND LATINO DISCRIMINATION

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In 1954, the United States Supreme Court issued a landmark opinion in Hernandez v. Texas *that the equal protection guaranteed by the Fourteenth Amendment applied not only to African-Americans, but also to other groups, specifically Mexican-Americans. The Court stated that systematically excluding Mexican-Americans from a jury deprived Hernandez of his right to be tried by a jury of his peers. Following* Hernandez *though, the Supreme Court and other U.S. courts have handed down opinion after opinion allowing for peremptory strikes based on English-Spanish bilingualism, a defining trait of the United States Latino population. By allowing these strikes, Courts are largely excluding Latinos from juries and engaging in de facto discrimination which is illegal under* Hernandez *and now additionally* Batson v. Kentucky. *As the Latino and Spanish speaking population of the United States, and thus Texas, continues to grow, the United States justice system must change course in order to include these citizens and respect their constitutional rights.*

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I. INTRODUCTION

> "One language sets you in a corridor for life. Two languages open every door along the way."[1]

Language is perhaps the most important part of daily human life. It governs the ability to communicate and interact with the world around us; the ability to be a part of society. "Similar to sex and race, language is a characteristic vital to human perception," and the determination of one's place in that society.[2] Speaking a different language than the majority of the society is likely to put a person in a position of vulnerability. People who speak a different language are unable to fully integrate because of this lack of communication. Conversely, speaking multiple languages allows a person to full integrate into multiple societies; to find more 'doors' into the world around them.

The largest gatekeeper in the United States justice system is the English language. For those accused of a crime, lacking the ability to proficiently speak English means that they will have to rely on the help of others through the entire adjudication process. They lose the ability to advocate effectively for themselves and have to rely on the abilities of courtroom interpreters. Other players in the criminal justice system, such as jurors, are also barred from fully participating because of language differences. In theory, this loss of agency should not apply to bilingual Americans who are interacting with the justice system. While they additionally speak another language, their proficiency in English should open doors, not close them.

1. FRANK SMITH, TO THINK: IN LANGUAGE, LEARNING AND EDUCATION (1992).

2. Graham Douds, *International Human Rights Implications of Voir Dire Discrimination: Critical Examination of Contemporary Language Qualifications in Criminal Proceedings*, 47 RE. JURIDICA U. INTER. P.R. 715, 727 (2012).

Unfortunately, this is not the reality for bilingual Americans wanting to serve on certain criminal juries. Following the Supreme Court decision in *Hernandez v. New York*, jurors who are bilingual in English and Spanish may be struck by a peremptory challenge and removed from juries if a case involves both Spanish and English evidence.[3] This ruling, both directly and in its effect, has allowed for the mass removal of Latino jurors from American criminal juries.

The allowance of peremptory challenges against English-Spanish bilingual jurors by the Supreme Court of the United States in *Hernandez v. New York* is de facto discrimination against Latino Americans which violates the Equal Protection Clause of the 14th Amendment, amounts to the legal recognition of a current community prejudice against individuals of a certain national origin as prohibited by the Court almost 70 years ago in *Hernandez v. Texas*, and is against good public policy in the United States, and specifically the Texas.

II. LATINOS IN THE UNITED STATES AND BILINGUALISM

According to the United States Census Bureau, the Latino population of the United States as of July 1, 2017 was 58.9 million.[4] Of this group, 11.4 million Latino people live in Texas making up 39.6% of the state's population.[5] By 2060, the Latino population is projected to increase to 119 million, a 115% increase, and make up 29% of the U.S. population as a whole.[6] Not only will Latino people make up over one-quarter of the United States population, they will also make up 33.5% of the under 18 years old population.[7] The Latino population is also projected to have a downward shift in the percentage of people born outside the United States; 45.8% of the population in 2014 to 41.6% in 2060.[8] While birth place is not synonymous with citizenship, a larger population of native born Latino people will increase the percentage of the overall population that is U.S. citizens.

3. 500 U.S. 352 (1991).

4. U.S. CENSUS BUREAU, HISPANIC HERITAGE MONTH 2018: PROFILE AMERICA FACTS (2018), https://www.census.gov/content/dam/Census/library/visualizations/2018/comm/hispanic-fff-2018.pdf [https://perma.cc/P8H2-RR8Y].

5. *Fast Facts as of July 1, 2018*, U.S. CENSUS BUREAU (2018), https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/R432-HQTS].

6. SANDRA L. COLBY & JENNIFER M. ORTMAN, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014-2060, 9 (2015) https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf [https://perma.cc/W5TJ-Y386]. .

7. *Id.* at 10.

8. *Id.* at 12.

According to a 2013 Pew Research Center survey, 36% of Latino adults identify as English-Spanish bilingual.[9] This percentage varies with age. Adults in the traditional 'middle-aged' bracket currently have the lowest rates of bilingualism, while adults 18-29 and those that are 60+ have over 40% of their respective populations identifying as bilingual.[10] Interestingly, English-Spanish bilingualism currently peaks with the second Latino generation in the United States.[11] In this group, over 50% identify as bilingual, which can often be attributed to this population straddling the cultures and languages of the United States and their parents during childhood.[12] This statistic has the potential to be extremely interesting for the future of the Spanish language in the United States, and especially Texas, when looking at the large waves of migration of Spanish speakers currently at the U.S. border.

During the language survey, 95% of Latino adults agreed that it was "important for future generations of U.S. Hispanics to speak Spanish."[13] Why is Spanish language so important to the Latino population in the United States? Researcher Carlos Santos stated this desire succinctly: "[The Spanish language] is a connection to their culture, their parents, their ancestors and their history. It is part of who they are, who they were and who they will be."[14] Historically, in the United States it has been understood that "language, like religion and other protected classes outside race or sex, help[s] form associational identity."[15] For many Latino people, Spanish language is the basis for an identity that is ever changing in the United States socio-political landscape and while a large percentage of Latinos say that learning English is extremely important, they do not want Spanish to disappear from their families lives.[16] Spanish is not only a language, but in fact a part of their racial makeup. This proliferation of Spanish-language in Latino-American culture is evident from the fact that 97% of all bilingual

9. PEW RESEARCH CTR., 2013 SURVEY OF U.S. LATINOS (2013), https://www.pewresearch.org/hispanic/dataset/2013-national-survey-of-latinos/.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. Christopher F. Bagnato, *Change is Needed: How Latinos are Affected by the Process of Jury Selection*, 29 CHICANO-LATINO L. REV. 59, 67 (2010).

15. Douds, *supra* note 2, at 747.

16. Bagnato, *supra* note 14, at 67.

Spanish speakers in the United States identify as 'Latino' and most Latino people claim at least some knowledge of Spanish.[17]

English-Spanish bilingualism as a part of the Latino racial makeup in the United States is not only a feeling to those that are a part of it, but a fact that can be shown in socio-linguistic research. Many monolinguals in the United States, those who only speak one language, think that bilinguals are "the sum of two incomplete monolinguals," but research shows that bilinguals are in fact "a unique and specific linguistic configuration."[18] Rather than having different sections or areas of their brains for each language, bilingual speakers acquire and process language in a much more complex way.[19]

Another importance facet of bilingual life is code-switching, or the practice of switching languages between or within sentences.[20] For many years, "linguist and educators . . . considered this switching . . . as deviant and suspect," but research into the bilingual brain shows that "code-switching, rather than representing a debased or inferior linguistic adaptation, is a verbal skill requiring a high level of linguistic ability in both languages."[21] In a study of Norwegian-English bilinguals it was found that this code switching happens unconsciously and that the speakers often weren't even aware they were switching back and forth; "they are accustomed to having bilingual speakers before them, and know that whichever language they use, they will be understood."[22] Bilinguals never turn-off or turn-on one language or the other and it is in fact impossible for them to do so.[23] Both languages make up their understanding of communication and the world around them. Put another way, "bilingualism is largely an immutable trait over which the individual has little, if any, conscious control."[24]

17. Brief for The Mexican American Legal Defense and Educational Fund and the Commonwealth of Puerto Rican Community Affairs in the United States, as Amici Curiae in Support of Petitioner at 3, Hernandez v. New York, 498 U.S. 894 (1990) (No. 89-76745).

18. Francois Grosjean, *The Bilingual as a Competent but Specific Speaker-Hearer*, 6 J. MULTILINGUAL & MULTICULTURAL DEV. 467, 468 (1985).

19. Alfredo Mirande, *Now That I Speak English, No Me Dejan Hablar ('I'm Not Allowed to Speak'): The Implications of* Hernandez v. New York, 18 CHICANO-LATINO L. REV. 115, 138 (1996).

20. RAFAEL ART JAVIER, THE BILINGUAL MIND THINKING, FEELING AND SPEAKING IN TWO LANGUAGES 53 (2008).

21. *See* Evelyn P. Altenberg & Helen Smith Caims, *The Effect of Phonotactic Constraints on Lexical Processing in Bilingual and Monolingual Subjects*, 23 J. VERBAL LEARNING & VERBAL BEHAV. 174 (1983).

22. *See* EINAR HAUGEN, THE NORWEGIAN LANGUAGE IN AMERICA 65 (1969).

23. Mirande, *supra* note 19, at 146.

24. *Id.* at 147.

III. LATINOS AND THE UNITED STATES JUSTICE SYSTEM

A. Hernandez v. Texas

In 1951, Pete Hernandez was a 21 year-old Mexican-American living in Jackson County, Texas and working as a cotton picker.[25] Following a disagreement that arose in a bar, Hernandez allegedly shot and killed Joe Espinosa.[26] Hernandez was indicted for the murder by a grand jury in Jackson County, but prior to trial his attorney moved to quash both the indictment and the jury panel.[27] He asserted that persons of Mexican descent had been systematically excluded from jury service.[28] Petitioner stated that because he was also Mexican-American, this exclusion deprived him of his equal protection rights under the Fourteenth Amendment.[29] This motion was denied at its initial hearing, denied again when renewed at trial, and after Hernandez was convicted, denied by the Texas Court of Criminal Appeals as the basis of Hernandez's appeal.[30]

At the United States Supreme Court, Hernandez's attorneys, the first Mexican-American attorneys to argue there, again asserted that Hernandez was denied his equal protection rights by the State of Texas.[31] In order to prove this, Hernandez's attorneys needed to establish that Mexican-Americans were their own separate class and that this class had been actually discriminated against.[32] For their first point, that Mexican-Americans were their own separate class, Hernandez's attorneys pointed to the attitude of the community towards the Mexican-American population.[33] They argued that "Latinos were, paradoxically, legally characterized as white, but socially treated as non-white."[34] His attorneys provided the court with testimony from city officials which stated that "the community distinguished between 'white' and 'Mexican'," that "participation of persons of Mexican descent in business and community groups was shown to be slight," and

25. *Hernandez v. Texas*, THE STATE BAR OF TEXAS, https://www.texasbar.com/civics/High%20School%20cases/hernandez-v-texas.html [https://perma.cc/MRF3-QJJB] (last visited March 11, 2020).

26. *Id.*

27. *Hernandez v. Texas*, 347 U.S. 475, 476 (1954).

28. *Id.* at 476-77.

29. *Id.*

30. *Id.*

31. Jenny Cobb, *Hernandez v. Texas: "A Class Apart"*, THE BULLOCK MUSEUM, https://www.thestoryoftexas.com/discover/artifacts/hernandez-v-texas-spotlight-050115 [https://perma.cc/KL4M-3DQ5] (last visited March 11, 2020).

32. *Hernandez*, 347 U.S at 479.

33. *Id*.

34. Bagnato, *supra* note 14, at 60.

that not long before this case reached the Court, "children of Mexican descent were required to attend a segregated school for the first four grades."[35] Additionally they provided evidence of 'No Mexicans Served' sign in a restaurant window and that the very courthouse in which the original trial took place had two different men's toilets, "one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here')."[36]

Turning to their second point, that as a separate class Mexican-American's had been discriminated against in Jackson County, Hernandez's attorneys used a pattern of proof from an earlier discrimination case *Norris v. Alabama*.[37] In *Norris*, plaintiffs had been able to establish prima facie proof of systematic discrimination by showing that some African Americans were qualified to serve as jurors, but none had actually been called.[38] Here, Hernandez's attorneys "established that 14% of the population of Jackson County were persons with Mexican or Latin-American surnames, and that 11% of the males over 21 bore such names."[39] Records also showed that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County."[40] In addition, both parties stipulated that "there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, householders, or freeholders, and having all other legal prerequisites to jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury."[41]

With sufficient evidence supporting both of these points, Hernandez's attorneys were able to meet the burden of proof required by *Norris v. Alabama*, and the burden shifted to the State of Texas to show that discrimination had not occurred.[42] Texas had initially argued that this was not an appropriate case for equal protection analysis in the first place and believed that the Court should hold that the Fourteenth Amendment protections only applied to "white and Negro" citizens.[43] But, following Hernandez's successful argument that created a separate group for Mexican-Americans, Texas instead provided the testimony of five jury commissioners stating

35. *Hernandez*, 347 U.S at 479.
36. *Id.* at 479-80.
37. *Id.* at 480.
38. *Norris v. Alabama*, 294 U.S. 587, 581 (1935).
39. *Hernandez*, 347 U.S at 480.
40. *Id.* at 481.
41. *Id.*
42. *Id.*
43. *Id.* at 477.

that they had not discriminated, but instead were trying to "select those whom they thought were best qualified."[44] The Court disagreed with Texas on all accounts, and in a unanimous decision, stated that Texas had in fact violated Hernandez's Fourteenth Amendment rights and noted that Texas itself had taken a broader view of the Fourteenth Amendment in prior actions.[45] The Court held that while the system in Texas wasn't inherently unfair and was "capable of being utilized without discrimination," it was susceptible to being used by those in power in a discriminatory fashion.[46] Hernandez had succeeded in showing that "people of Mexican ancestry constituted a separate class from white in Jackson county . . . [and despite] their *de jure* white status, Mexican Americans occupied a *de facto* non-white status,"[47] and that he was constitutionally entitled "to be indicted and tried by juries from which all members of his class are not systematically excluded – juries selected from among all qualified persons regardless of *national origin or descent*."[48]

Writing for the majority in *Hernandez* Justice Warren also expounded on the very nature of discrimination in juries, stating that:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.[49]

B. Hernandez v. New York

While *Hernandez v. Texas* served to protect the Latino population from being excluded from juries based on their national origin, the 1991 Supreme Court decision in *Hernandez v. New York* functionally stripped these protections for many in ruling against bilingual jurors.[50] The case against Dionisio Hernandez began in the New York Supreme Court, Kings

44. *Id.* at 481.
45. *Id.* at 477-78.
46. *Id.* at 478-79.
47. Bagnato, *supra* note 14, at 62 (citing *Hernandez*, 347 U.S. at 479-80).
48. *Hernandez*, 347 U.S at 482 (emphasis added).
49. *Id.* at 487.
50. *Hernandez v. New York*, 500 U.S. 352, 358 (1991).

County.[51] Hernandez allegedly fired shots at Charlene Calloway and her mother, Ada Saline, as they left a restaurant in Brooklyn.[52] Charlene and two bystanders in the restaurant were hit by shots, but all of the victims survived.[53] Hernandez was charged with two counts of attempted murder and two counts of criminal possession of a weapon.[54] Before his trial began, Hernandez's attorney objected to the striking of four potential jurors during the voir dire process. [55] Hernandez claimed that each of these jurors were Hispanic and the prosecutor had violated his equal protection rights by striking these jurors because they had Hispanic surnames.[56] The ethnic origin of one of these jurors was not known, but the record showed that the other three were the only possible jurors with Hispanic surnames.[57] The prosecutor asserted two different reasons for the striking of these jurors. First, two of the potential jurors had stated during voir dire that they had family members who had been convicted of crime, one of which was being prosecuted by the same district attorney's office.[58] Second, he stated that his peremptory challenges to the other two potential jurors were due to "specific responses and the demeanor . . . during voir dire [which] caused him to doubt their ability to defer to the official translation of Spanish-language testimony."[59] The trial court accepted this reasoning and Hernandez was subsequently convicted; on appeal, the New York Supreme Court affirmed the order of the trial court and concluded that the prosecutor's explanations were race-neutral and showed a lack of intentional discrimination.[60]

The United States Supreme Court analyzed Hernandez's claim using the framework laid out in *Baston v. Kentucky*.[61] *Batson*, decided in 1986, created a three-part test for defendants to use in order to show that a prosecutor was using peremptory challenges based on race.[62] When using the *Batson* test, a defendant must first make a prima facie showing that the challenged peremptories were based on race.[63] After this prima facie show-

51. *People v. Hernandez*, 528 N.Y.S.2d 625, 626 (N.Y. App. Div. 1988).
52. *Hernandez*, 500 U.S. at 355.
53. *Id*.
54. *Id.*
55. *Id.*
56. *Hernandez*, 528 N.Y.S.2d at 626.
57. *Id.*
58. *Hernandez*, 500 U.S. at 355.
59. *Id.* at 360.
60. *Hernandez*, 528 N.Y.S.2d at 626 (citing *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986)).
61. *Hernandez*, 500 U.S. at 358.
62. *Batson*, 476 U.S. at 96-98.
63. *Id*. at 96-97.

ing, the prosecution must give a race-neutral reason for the challenged strikes.[64] Finally, the court decides "whether the defendant has carried his burden of proving purposeful discrimination."[65] Considering *Hernandez*, the Court reached a plurality opinion.[66] First, the Court found that the prima facie issue was moot.[67] The prosecutor had "defended his use of peremptory strikes without any prompting or inquiry from the trial court" and "the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination."[68] Even though this was not normal *Batson* procedure, the Court stated that since "the trial court . . . ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing bec[ame] moot."[69]

Next the Court turned to the prosecutor's stated race-neutral reasons for striking the jurors in question. When considering if these challenges violated the Equal Protection Clause, the Court "assum[ed] the proffered reasons for the peremptory challenges are true."[70] Justice Kennedy noted that:

> A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[71]

Hernandez argued that "Spanish-language ability bears a close relation to ethnicity" and due to that 'close relation' the barring of a potential juror because they speak both English and Spanish should violate the equal protection clause.[72] Specifically, Hernandez emphasized "the high correlation between Spanish-language ability and ethnicity in New York, where the case was tried."[73] Justice Kennedy stated that this argument did not need to

64. *Id.* at 97-98.
65. *Id.*
66. *See Hernandez*, 500 U.S. at 355.
67. *Id.* (citing *U.S. Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 715 (1983)).
68. *Hernandez*, 500 U.S. at 359.
69. *Id.*
70. *Id.*
71. *Hernandez*, 500 U.S. 361 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-265 (1977) and *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979))
72. *Id.*
73. *Id.* at 362.

be addressed because the prosecutor spoke of specific responses and demeanor, not excluding the jurors because of their Spanish abilities or ethnicity, but seems to contradict himself later in the opinion when he agreed that "it may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."[74] Turning away from Hernandez's argument, the Court instead focused on the prosecutors reasoning behind the strikes. The prosecutor stated that he did not intend to exclude Latino or bilingual jurors, going as far as to point out that the victims and the witnesses in this case would also be Latino.[75] Instead his focus was on the exact responses given by the possible jurors which made him doubt that they would be able to accept the official translator's English translation of Spanish-language testimony.[76] The Court acknowledges that removing Latino's for their ethnicity would violate the Equal Protection clause, but stated that is not what happened here because the category of potential jurors who would "have difficulty in accepting the translator's rendition of Spanish-language testimony . . . would include both Latinos and non-Latinos."[77] While allowing these types of peremptory challenges might have a "disproportionate impact [on prospective Latino jurors, that] does not turn the prosecutor's actions into a per se violation of the Equal Protection Clause."[78] The Court followed up with a slippery slope argument that posited that if they allowed this to be a racial classification, "it would follow that a trial judge could not excuse for cause a juror whose hesitation convinced the judge of the juror's inability to accept the official translation of foreign-language testimony."[79]

Finally, the Court analyzed the finding of the trial court that Hernandez failed to show purposeful discrimination.[80] Here the Court emphasized that the issue of discrimination is a factual one, and because the trial court is the place for fact issues, the judgment of the trial court should be given deference on review.[81] Using a clearly erroneous standard, the Court found that the trial judge's finding was permissible, and thus the lower court fully

74. *Id.*

75. Juan F. Perea, Hernandez v. New York: *Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 9 (1992).

76. *Hernandez*, 500 U.S. at 356.

77. *Id.* at 361.

78. *Id.*

79. *Id.*

80. *Id.* at 363 (quoting *Batson*, 476 U.S. at 98).

81. *Id.* at 364-65 (citing *Batson*, 476 US at 98).

applied the three-prong Batson test correctly and the decision was affirmed by the Supreme Court.[82]

The dissent in *Hernandez v. New York* focused largely on the impact that this decision would have and from that found a violation of the Equal Protection Clause. Justice Stevens, joined by Justice Marshall, asserted that "an explanation that is race-neutral on its face is nonetheless unacceptable if it is merely a proxy for discriminatory practice."[83] Here the impact of a disqualification of a disproportionate number of Spanish-speaking jurors was simply too great for this prosecutor's reasoning to be considered race-neutral.[84] Next, Stevens stated that less drastic means could have satisfied the prosecutor's interests and the existence of less drastic means should mean the stated rationale for these peremptories should not be accepted as legitimate.[85] Citing to *Albemarle Paper Co. v. Moody*, a case in which the Supreme Court stated that if an employer has alternate tests or devices that do not have a disproportionate impact, the tests they were using were likely discriminatory, Stevens argued that the trial court had the ability to instruct the jury on using only the official English translation as evidence or only allowing the jury to hear the official translation in the court room.[86] Stevens concluded by stating that the plurality gave far too much value to the prosecutor's subjective reasoning in this case and too little value to the disparate impact, echoing his concurrence in the earlier *Washington v. Davis* case in which he stated: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."[87]

C. Further United States Court Decisions Concerning Language Rights

Courts in the United States have addressed language concerns and the importance of language to group classifications in various other contexts. In *Meyers v. State*, a case addressing concerns over immigrant children learning foreign languages and their allegiance to the United States, the U.S. Supreme Court recognized that a person's language informs his or her ideas, experiences, and perceptions of the world.[88] Language was an im-

82. *Id.* at 372.
83. *Id.* at 379 (Stevens, J., dissenting)
84. *Id.* at 376 (Stevens, J., dissenting)
85. *Id.*
86. *Hernandez*, 500 U.S. at 375 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).
87. *Washington v. Davis*, 426 U.S. 229, 253 (1976).
88. *See Meyer v. Nebraska*, 262 U.S. 390 (1923).

portant characteristic of the country that a person had emigrated from, and thus in a post-World War I world, could be a factor of concern regarding where their loyalties lie.[89] This assumption of language being able to define a group was echoed in different circumstances in *United States v. Benmuhar*.[90] There, the First Circuit found that the sole use of English in Puerto Rico's federal courts was constitutional.[91] While this ruling was a blow to those who believed the Spanish-speaking population was being disadvantaged by the practice, the court assumed argumentatively that language ability constituted a basis for defining a distinct group, Spanish-speaking Puerto Ricans.[92] A final important case to consider when looking at language and the United States justice system is *United States v. Dempsey* out of the Tenth Circuit.[93] There the court held that the presence of a thirteenth person during deliberations, that person being a sign language interpreter for a deaf juror, was allowed and did not pose confidentiality problems, inhibit juror deliberation, or deprive the defendant of a fair and impartial jury trial.[94] The court also addressed a possible issue with interpretation. Hoffman, the deaf juror in the case, was able to read lips and because of this the court stated that she provided a check on incompetent or slanted interpretation because she would be able to check the accuracy of much of the interpreter's translation. [95]

IV. PEREMPTORY STRIKES OF BILINGUAL JURORS IN CASES WITH SPANISH LANGUAGE TESTIMONY AMOUNT TO DISCRIMINATION AGAINST LATINOS IN THE UNITED STATES AND SHOULD BE UNCONSTITUTIONAL

Hernandez v. New York was incorrectly decided for three reasons: first, Spanish bilingualism and Latino ethnicity are so closely tied that peremptory exclusion of English-Spanish bilingual jurors should not meet *Batson standards*; second, even if a *Batson* violation was not found, the concerns articulated by the prosecutor in *Hernandez v. New York* are unfounded and an example of a current community prejudice stemming from national origin as warned against in *Hernandez v. Texas*; and finally, allowing peremptory strikes against English-Spanish jurors sacrifices crucially important principles of law and justice in favor of imagined efficiency.

89. *See id.*
90. *See United States v. Benmuhar*, 658 F.2d 14 (1st Cir. 1981).
91. *Id.* at 20.
92. *Id.* at 19.
93. *United States v. Dempsey*, 830 F.2d 1084, 1088 (10th Cir. 1987).
94. *See id.*
95. *Id.*

A. Hernandez v. New York *was Incorrectly Decided and the Prosecutor's Actions Were in Violation of the Test Articulated in* Batson v. Kentucky

A deeper understanding of Latino American ethnicity and English-Spanish bilingualism shows that English-Spanish bilingualism is simply a facet of ethnicity, not a separate characteristic of Latino Americans. Race is not only the defining factor of *Batson* analysis, but has always been that of Equal Protection analysis because the anti-discrimination regime arose out of the post-civil war amendments created to eliminate unequal treatment of African-Americans.[96] This focus on race has always meant that "a racial classification regardless of purported motivations, is presumptively invalid and can be upheld only upon extraordinary justification."[97] As noted above, the prosecutor in *Hernandez v. New York* stated that the peremptory strikes related to the juror's hesitancy about agreeing to listen solely to the interpreter's testimony rather than the original Spanish testimony, but no transcript was made of this voir dire examination at the original trial.[98] Instead what the Court had to decide on were the prosecutors own words:

> We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it [the interpreter's translation], but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses . . . I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter . . . I feel that in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury.[99]

These statements are problematic under *Batson* for two main reasons. First, there is no evidence that the prosecutor questioned any other members of the venire panel about their abilities to speak Spanish.[100] Additionally, the prosecutor assumed the language competency of the two Latino jurors before any questioned were asked to actually assess that competency.[101] This suggests that the prosecutor himself inherently equates Spanish

96. Mirande, *supra* note 19, at 132.
97. *Feeney*, 442 U.S. at 272.
98. Mirande, *supra* note 19, at 117.
99. *Hernandez*, 500 U.S. at 356-57.
100. *People v. Hernandez*, 552 N.E.2d 621, 628 (N.Y. App. Div. 1988) (Kaye, J., dissenting).
101. Mirande, *supra* note 19, at 146.

and English-Spanish bilingualism with the Latino race, while simultaneously trying to say that this is not why the jurors were targeted. Both jurors questioned by the prosecution also stated that they would abide by the instructions, the prosecutor even stated this in his own testimony, but the prosecution decided that these assurances could not be true.[102] As suggested by the dissent during the Court of Appeals phase of the *Hernandez* case, a true strike based on inability to abide by translation should be a strike for cause.[103] Here, jurors could not be stricken for cause because they had not stated they could not follow the instruction, so instead this inability was shifted into being the purported race neutral reason for striking.

The main criticisms of the *Batson* framework arise from beliefs that it simply isn't effective when tasked with discovering more discrete prejudices.[104] This criticism is rooted in the fact that a prosecutor who is predisposed to discriminate will not be hard pressed to find a supposedly race neutral reason to remove a juror and they will be "afforded ample opportunity to discriminate."[105] How this case plays out is an almost perfect illustration of that concern. Here, the Court relied almost exclusively on the prosecutors' testimony regarding the reasoning for the strikes, did not seem to consider the surrounding evidence, and chose not to consider the impact the prosecutors actions had upon the jury.[106] The Court "created a procedural side-show, a promise of equal protection devoid of substantive content."[107] Additionally, the prosecutors' reasoning made little sense considering the manner that questioning of prospective jurors was conducted. Only jurors singled out based on their Latino race were asked questions about their Spanish language abilities. They were struck based on their bilingualism as an assumed, and inherent, part of their race.

B. Even if a Batson *Violation was Not Found, The Prosecutor's Actions Represent a Current Community Prejudice as Warned Against in* Hernandez v. Texas

An argument could be made that this exclusion could not amount to a *Batson* violation due to the multi-racial makeup of English-Spanish bilinguals in the United States, but even if this argument was successful, the

102. *Hernandez*, 552 N.E.2d at 627 (Kaye, J., dissenting).

103. *Id.*

104. *See* Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of* Batson v. Kentucky, 25 WILLAMETTE L. REV. 293, 317 (1989).

105. James S. Wrona, Hernandez v. New York: *Allowing Bias to Continue in the Jury Selection Process*, 19 OHIO N. U. L. REV. 151, 160 (1992).

106. *Id.* at 161.

107. Perea, *supra* note 75, at 15.

concerns articulated by the prosecutor in *Hernandez v. New York* are unfounded and an example of a current community prejudice stemming from national origin as warned against in *Hernandez v. Texas* and deemed unconstitutional by the Court. While the holding in *Hernandez v. Texas* was made in relation to a Mexican-American defendant, the legal principal has been applied more widely to Latinos in general and language is an indivisible part of that holding. As noted previously, evidence used in order to prove the separate status of Mexican-American's included segregation signs in Spanish and evidence to show discrimination included the records of residents with Spanish surnames. This emphasis on Spanish language may or may not have been intentional, but it was unavoidable "because language is a quasi-immutable trait, [and] discrimination on the basis of language is functionally equivalent to discrimination on the basis of national origin."[108]

Writing the opinion for *Hernandez v. Texas*, Justice Warren made the choice to leave the door open for groups not yet considered to show discrimination in the future. To allow groups to define themselves and the discrimination they faced in the context of their own time, rather than stating that the constitution provided for a 'static' definition of prejudice.[109] This definition should be correctly applied to include a current community prejudice in the United States against Spanish speakers, and within that group, English-Spanish bilinguals. This potential for prejudice around language was in fact recognized by the Court in the *Hernandez v. New York* opinion: "Just as a shared language can serve to foster a community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn."[110]

Warren's framework states that the existence of a current community prejudice is "a question of fact,"[111] and facts about the current climate towards Latino-Americans and English-Spanish bilinguals demonstrate this prejudice. Studies culminating in 2018 have shown that hate crimes are on the rise generally in the United States.[112] In a recent poll, 4 out of 10 Latinos in the United States stated that they have personally experienced dis-

108. *See* Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

109. *See Hernandez*, 347 U.S. at 478.

110. *Hernandez v. New York*, 500 U.S. at 369-70.

111. *Hernandez*, 347 U.S. at 478.

112. Dani Anguiano, "*It's Worse than Ever": How Latinos are Changing their Lives in Trump's America*, THE GUARDIAN (October 7, 2019), https://www.theguardian.com/us-news/2019/oct/06/latinos-trump-hate-crimes-el-paso [https://perma.cc/YG82-CL5J].

crimination in the last year.[113] Many specifically cited being told to "go back to Mexico" or go back to "where they came from" after speaking Spanish in public places.[114] These aggressors had a specific prejudice towards Spanish language because they viewed it as an inherent part of being an outsider, being unamerican. Those who spoke Spanish, whether it was their sole language or one of many, were their own unique group.

The second step in Justice Warren's formula for showing a current community prejudice is demonstrating that the identified class has been singled out for unequal treatment by the laws and that this unequal treatment is "not based on some reasonable classification."[115] The prosecutor, and later the Supreme Court in *Hernandez v. New York*, stated that it was okay for bilingual jurors to be treated differently in multilingual cases because of concerns about their ability to listen to and accept the English language translation of Spanish language testimony.[116] But the line of questioning engaged in by the prosecutor was based on a fundamental misunderstanding of how bilinguals comprehend language and created an unreasonable divide between English-Spanish bilingual jurors and monolingual English speaking jurors. The Prosecutor asked bilingual jurors if they could guarantee that they would adhere to the English language translation of testimony, but this question is nearly impossible for the juror to answer in the abstract. To answer this question, a possible juror "must have some assurance that the interpretation will be faithful to the testimony and correct."[117] This seems like a given to those who work in the criminal justice system regularly, but a juror, especially a Latino bilingual juror who would thus far has been largely disenfranchised by the justice system, may not understand this basis. Functionally, the prosecutor was asking jurors to "pledge allegiance to a potentially false interpretation."[118] This created confusion for the jurors, with one of the excluded *Hernandez* jurors later stating in an interview, "[t]he problem . . . is that if there were a discrepancy in the Spanish and English, I wouldn't know how to deal with it."[119] Choosing to exclude all English-Spanish bilinguals, and by extension a majority of Latinos, from juries is not a "reasonable" way to handle this confusion though. There are already existing procedures for jurors to ask questions of a judge or clarify confusion. These could easily be used to

113. *Id.*
114. *Id.*
115. *Hernandez*, 347 U.S. at 478.
116. *See Hernandez*, 500 U.S. at 371.
117. Perea, *supra* note 75, at 29.
118. *Id.*
119. *Id.* at 30.

allow bilingual jurors to ask questions if they arose and if the translation is done correctly, the questions should not arise in the first place. The ease with which the justice system could choose to involve these jurors, rather than excluding a large group of Americans from jury service, fulfills the second prong of Justice Warren's current community prejudice standard and thus this treatment of bilingual jurors should be unconstitutional.

C. Current Jurisprudence Concerning Bilingual Jurors Values Efficiency and Ease Over the Constitutional Rights of Bilingual American Citizens and Must Be Corrected

In *Offutt v. United States*, Justice Frankfurter stated that "justice must satisfy the appearance of justice."[120] This statement has proven to be extremely true in modern American society, especially at the intersection of issues of justice and race where it is has been shown time and time again that justice is nothing without legitimacy. One example of this can be found in the aftermath of the Rodney King case and the riots that engulfed Los Angeles following the verdict. There, an all-white jury did not convict white police officers of a brutal beating of a black man.[121] The public could not find justice in this verdict "because [the jury's] composition lacked legitimacy."[122] The violence and destruction that followed this verdict "is a forceful reminder that the appearance of justice matters. Whether or not justice was done in the case, the appearance of justice was absent."[123] Removing entire groups from juries creates a lack of legitimacy in the verdict they hand down. It also has effects on the verdict itself. As stated by Justice Marshall in *Peters v. Kiff*:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[124]

This principle remains true when the group excluded is identified by the languages they speak. When English-Spanish bilinguals are removed from juries in cases that use Spanish translation and this removal amounts

120. 348 U.S. 11, 13 (1954).
121. Perea, *supra* note 75, at 2.
122. *Id.*
123. *Id.*
124. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

to the near total exclusion of Latino jurors, "the fabric of the legal system is undone."[125] Latinos have historically been excluded from juries in the United States "because they did not know English. After Hernández [sic], they can be excluded because they do."[126] This linguistic exclusion of United States citizens does not serve to benefit the United States criminal justice system. As the United States continues to diversify, the judicial system must focus on continued inclusion because "linguistic inclusion of an individual in any judicial community, as opposed to their linguistic exclusion, can only foster . . . collaboration in any judicial proceeding."[127] Exclusion not only infringes on the equal protection rights of Latino Americans, but also continues to foster a distrust of the judicial system in Latino communities.[128]

The reasoning laid out in *Hernandez v. New York* and its progeny represent a line of thinking that values courtroom efficiency over rules which best promote justice and principles of law. It values ease over the reality of functionally excluding an entire race of American jurors. But constitutional principles are not based on ease, and the American criminal justice cannot continue to "exclude Spanish-speakers from jury because of illusory race neutral means."[129] The fears articulated by the prosecutor and the Court in *Hernandez* are not truly fears about the comprehension abilities of bilingual jurors, but instead "the possibility that the interpreter's 'official' version of Spanish-language testimony will be materially different from the actual Spanish-language testimony."[130] The prosecutor and Court's desire to get a bilingual juror to commit to only listening to one language, an impossibility for the bilingual brain, would not be a concern if they were positive that "[the interpreter's] testimony was identical in content to the Spanish-language testimony."[131] Unfortunately, this is not always the case. There is ample evidence in both state and federal courts that interpreters frequently may not be accurate because of the great difficulty of their task.[132] Some of these inaccuracies are inherent in the interpretation process, even when you have a highly qualified interpreter.[133] Unlike a witness who simply answers

125. Douds, *supra* note 2 at 747.

126. Mirande, *supra* note 19, at 148.

127. Cynthia M. Costas-Centivany, *Language Rights in Criminal and Civil Court Proceedings: Their Constitutional Protection in Spain vs. Puerto Rico*, 42 CAL. W. INT'L L.J. 407, 420 (2012)

128. Wrona, *supra* note 105, at 157.

129. Bagnato, *supra* note 14, at 66.

130. Perea, *supra* note 75, at 21.

131. *Id.*

132. *See* ROSEANN D. GONZÁLEZ ET AL., FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE, 47-55 (Carolina Academic Press 1991).

133. Perea, *supra* note 75, at 23.

questions, "interpreters challenge and correct attorneys as they ask questions of [a] witness."[134] Additionally, "if a witness gives a nonsensical answer to an attorney's question, interpreters may attempt to explain such answers and clarify the situation, rather than simply interpret the witness's testimony."[135] This explanation and clarification is somewhat inevitable, as interpreters do not want their skills to be seen as inadequate because the witness is speaking incoherently. The process of translation also changes the jurors' relationship with witnesses even when done correctly. The interpreter distances jurors from the witness and interpreters are often known to "lengthen testimony when they convert Spanish into English, changing what is originally a powerful speech style into a powerless one, by adding verbal hedges, hesitations, and polite forms."[136]

Once the difficulties with interpretations in United States courtrooms are considered, it becomes clear that the problem is not actually with bilingual jurors, but instead with the interpretation itself. Here the exclusion of bilingual jurors, and the de facto exclusion of Latino jurors, becomes even more egregious because they have the ability to improve the system greatly. If translation in a courtroom was being done correctly, it would not matter if bilingual jurors heard it in both Spanish and English. It would mean the same thing and according to the most recent research about bilinguals, detailed above, it would likely be understood concurrently as one whole. Additionally, even with correct testimony, bilingual jurors would be uniquely situated to judge witness credibility and emotion which are lost on many jurors in the distance created by the translation process. If translation was in fact being done incorrectly, "Spanish-speakers, and Latinos derivatively . . . could reach more accurate and just ends then [sic] non-Spanish-speakers."[137] They would be aware of the errors as they occurred and would have the ability to improve the trial process by facilitating more accurate fact-finding.[138] Jurors acting in this manner would not be unprecedented, as illustrated above in the *Dempsey* case. The Tenth Circuit Court affirmatively stated that Dempsey's ability to listen to the sign language testimony and check its accuracy with her ability to read lips was a positive to the justice system and the trial process.[139] The inclusion of English-Spanish bilinguals and American Latinos would similarly improve the jus-

134. *Id.* at 23-24.
135. *Id.* at 24.
136. *Id.*
137. Bagnato, *supra* note 14, at 66.
138. *See* Perea, *supra* note 75, at 4.
139. *See Dempsey*, 830 F.2d at 1088-89.

tice system due to their ability to act as safeguards in trials that have English and Spanish speaking witnesses or multilingual documents.

V. CONCLUSION

In 2008, a Mexican man was beaten to death in Shenandoah, Pennsylvania by four high school-aged white males.[140] As they beat him, they yelled racial slurs relating to his Latino ethnicity and national origin. They told bystanders who looked Latino to "go back to Mexico" and "get out of Shenandoah or you will be lying next to him."[141] At their murder trial in Pennsylvania state court, the men were found guilty of only simple assault.[142] The reason? During deliberations, "jurors were too busy indulging their prejudice and perhaps looking for a way to spare the teenagers long prison sentences."[143] Here, an all-white jury "found it easier to relate to the white 'all-America[n] boys' sitting at the defendant's table than to the Mexican immigrant lying in the morgue."[144] While it is impossible to know what a different racial make-up of the jury would have done to the verdict in this case, it does not defy logic to make the assumption that if a Latino American had been present on that jury, they would have spoken up for the victim. This case illustrates why it is important for juries to have a diverse make-up of races, ages, and experiences. As noted above, when an entire group is removed from this process, the process is destroyed. The success of the criminal trial jury relies on its ability to assess the situation from diverse viewpoints.

By following the holding in *Hernandez v. New York*, which cleared the way for peremptory strikes based on bilingual abilities in trials that will involve Spanish language evidence, Courts have been enabling this destruction. Allowing de facto discrimination against Latino American citizens and their by and large removal from the American jury because of language abilities. This mistake is especially egregious because the results should be unconstitutional under both *Batson v. Kentucky* and *Hernandez v. Texas*, along with being terrible policy for a diversifying country. Allowing bilingual jurors to serve in bilingual trials not only improves the justice system as a whole, it is, most importantly the only way to respect the constitutional rights of Latino Americans.

140. Bagnato, *supra* note 14, at 60.

141. Office of Public Affairs, *Two Shenandoah, Pa., Men Sentenced for the Fatal Beating of Luis Ramirez*, U.S. DEP'T JUSTICE (Feb. 23, 2011), https://www.justice.gov/opa/pr/two-shenandoah-pa-men-sentenced-fatal-beating-luis-ramirez [https://perma.cc/9XVD-UTHS].

142. Bagnato, *supra* note 14, at 60.

143. *Id.*

144. *Id.*